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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. [redacted] 14

COMMONWEALTH COATINGS CORPORATION,

Petitioner,

—v.—

CONTINENTAL CASUALTY COMPANY, FIREMAN'S FUND INSURANCE COMPANY and A. C. SAMFORD OVERSEAS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable Justices of the Supreme Court:

Petitioner Commonwealth Coatings Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above entitled action on September 27, 1967.

Opinions Below

The opinion of the Court of Appeals for the First Circuit is reported at 382 F. 2d 1010. The opinion of the United States District Court for the District of Puerto Rico is unreported. Copies of said opinions are appended hereto. (Appendixes "A" and "B".)

Jurisdiction of the Court

Jurisdiction to review the said judgment by writ of certiorari is invoked under 28 U. S. C. §1254.

Questions Presented for Review

1. Is the failure of a "neutral" arbitrator to disclose prior employment by one of the parties, including services rendered on the very projects involved in the arbitration, sufficient ground to vacate an award, within the provisions of the Federal Arbitration Act?

2. Does the failure of such party to disclose such prior relationship constitute corruption and fraud in the procurement of the award, within the provisions of the Federal Arbitration Act?

3. Does such concealment of the prior relationship constitute misbehavior on the part of the arbitrator within the provisions of the Federal Arbitration Act?

Statute Involved

The Federal Arbitration Act, 9 U. S. C. §10 provides as follows:

"VACATION—GROUNDS REHEARING.

"In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators."

Other sections of the Act which may be pertinent to the consideration of the petition are set forth in Appendix "B" hereto.

Statement of the Case

Petitioner Commonwealth Coatings Corporation (hereinafter referred to as "Commonwealth"), was a subcontractor of respondent A. P. Samford Overseas Inc. (hereinafter referred to as "Samford"), for the performance of painting work on five projects in Puerto Rico on which Samford was the general contractor (R. 41a). The total amount of the subcontracts was $351,938.00 (R. 33a). The con-

tracts provided for progress payments to Commonwealth (R. 41a). Although Samford received payment from the owners in excess of the amount due to Commonwealth for work performed by it, Samford failed to make payment to Commonwealth in the sum of $113,566.05 (R. 42a-45a).

Commonwealth instituted suit against respondents, Continental Casualty Company and Fireman's Fund Insurance Company in the United States District Court for the District of Puerto Rico on Miller Act bonds given on one of the projects. (40 U. S. C. §§270(a) and 270(b); R. 2a, 12a; Civ. 441-62, 442-62.)

The contracts between Commonwealth and Samford contained the following provision for arbitration (R. 46a-47a):

> "Article XII: If any question of fact shall arise under this contract, either party hereto may demand an arbitration by reference to a Board of Arbitration, to consist of one person selected by Contractor, and one person selected by Sub-contractor, these two to select a third, and in case these two fail to select a third within three days, he shall be named by the Architect or his authorized representative. In case either Contractor or Sub-contractor fails to name an arbitrator within three days after requested to do so, the Architect, or his authorized representatives, shall name an arbitrator to represent the party so failing to name one. The written decision of any two of this Board shall be final and binding on both parties hereto. Each party shall pay one-half of the expense of such reference. Arbitration of a demand or decision by the Architect or Owner shall be made within 5 days following notification to Sub-contractor of such demand

or decision, otherwise Sub-contractor shall be bound thereby, unless the Owner shall agree to arbitration after that period. Provided, nothing contained herein shall excuse Sub-contractor from completion of the work in the manner provided in this contract nor shall the pendency of any dispute or arbitration proceeding excuse any delay, deficiency, default or noncompliance therewith."

Pursuant to such provision an arbitration proceeding was instituted between Commonwealth and Samford on the five sub-contracts (R. 31a). Upon the institution of the Arbitration proceedings, the Sureties obtained orders in the United States District Court staying the actions against them pending the decision in the arbitration proceeding (R. 3a, 13a). (Civ. 441-62, [illegible]-62.)

The Arbitration before three arbitrators resulted in a unanimous award on November 12, 1963 in favor of Samford discharging it from all liability to Commonwealth for any part and all of the unpaid balances on the sub-contracts in the sum of $142,435.51, and awarding Samford $15,872.35, which was the amount by which it was decided the completion costs in the sum of $158,307.36 exceeded the unpaid balances (R. 34a).

Commonwealth then moved in the United States District Court to vacate the award on the ground, among others, that there was evident partiality in the arbitrators, that after the rendition of the award, Commonwealth learned that the third arbitrator and chairman of the Board of Arbitration had a prior association with Samford which had not been disclosed to Commonwealth, and that if Commonwealth had known of such prior association, it would

not have consented to his appointment as an impartial arbitrator (R. 15a, 21a, 36a, 54a, 55a-61a). (Civ. 65-64, Federal Arbitration Act; 9 U. S. Code §10.) Commonwealth's motion to vacate the award was consolidated with the actions against the sureties, and left in abeyance until a final decision on the merits (R. 75a).

Hearings were had in the District Court with respect to the prior association of the third arbitrator with Samford (R. 72a-174a). At the conclusion thereof, the District Court denied the motion, confirmed the award and directed judgment in favor of Samford and the sureties (R. 175a-177a). Judgment was entered in the District Court on September 30, 1966 (R. 178a). The Court of Appeals affirmed on September 27, 1967.

The Facts as to the Prior Business Relationship Between the Third Arbitrator and Samford and the Failure to Disclose the Same to Petitioner

In accordance with the arbitration procedure established in the subcontracts, Commonwealth designated as one arbitrator an attorney Holman (R. 136a). Samford designated arbitrator Chapman (R. 32a). These two arbitrators designated one Jose L. Capacete as the third arbitrator and chairman of the Board of Arbitration (R. 32a, 48a, 136a). Holman died 2 or 3 days after the first meeting of the arbitrators (R. 136a). Commonwealth's attorney requested Capacete to give him names of attorneys who would have something to do with engineering. Capacete gave a list of 5 to 7 lawyers. Among these was Munoz, an attorney. Commonwealth designated him to take the place of the deceased arbitrator (R. 136a).

At the time of the designation of the arbitrators and prior to the arbitration hearings, Commonwealth's attorney investigated the arbitrators to discover if any of them had any previous business or financial relationship with Samford or any of its affiliates or holding companies or with Amos Samford. He found none (R. 54a). None of the arbitrators informed him that any of them had any prior business or financial relations with Samford or any of his companies (R. 54a). He testified that as an attorney, if he had known of any such relationship he would have challenged the arbitrator's capacity (R. 54a). He also testified that if he had been told of Capacete's prior relationship with Samford, he did not think he would have objected because he knew Capacete but he would certainly have told his client and given them the opportunity to determine (R. 142a). As a result of the failure to disclose the relationship, such opportunity was never given (R. 142a). Subsequent to the rendition of the award Commonwealth learned that Capacete had been previously employed by Samford on the very projects involved in the arbitration (R. 48a, 59a).

Capacete testified on the hearing in the District Court. He admitted that he knew Samford, that he and his company had worked for Samford prior to the arbitration and that such work was on projects involved in the arbitration (R. 126a). Capacete's company received approximately $12,500 from Samford, of which about three or four thousand dollars was for work on projects involved in the arbitration (R. 120a, 131a). Capacete admitted that he was never advised by Samford or its attorneys that his prior relationship with Samford should be disclosed, that he had no reason to believe that the matter should be disclosed

and that it never was disclosed (R. 127a, 128a). The failure to disclose such relationship is not disputed.

At the very time that Samford and Capacete were concealing their prior business relationship from petitioner, counsel for the surety companies imposed as a condition for Commonwealth's designation of an arbitrator to replace a deceased arbitrator, that the prospective arbitrator should have had no business prior relationship with the parties (R. 79a, 82-83a). Counsel declared such a reservation "a very reasonable thing and quite understandable" (R. 83a).

At one time during the arbitration, Capacete was going to resign as arbitrator and wrote a letter to the parties to that effect. Counsel for the surety companies asked him to stay as chairman of the board, and Capacete consented to stay (R. 126a). When he was asked at the hearing whether counsel knew about his previous employment by Samford, he said, "I have to say I imagine so, because I really don't know what goes through Currie's mind" (R. 127a).

Certiorari Should Be Granted for the Following Reasons

I.

Important question of federal law involved.

In view of the increasing use of "tri-partite" arbitrations to resolve commercial controversies, the important question of federal law presented has not been, but should be, settled by this Court, as to whether the failure of a "neutral" arbitrator, or of a party by whom he has been previ-

ously employed, to disclose such previous employment, is sufficient to invalidate an award under the Federal Arbitration Act.

The Court of Appeals has held in the instant case that "it would have been far better if there had been disclosure here" but it "could" not say that the relationship was sufficiently close to establish "evident partiality within the statute as a matter of law".

The importance of complete neutrality in a "neutral" arbitrator even though the other two arbitrators designated by the parties may not be completely disinterested has been recognized by the Courts.

In *Stef Shipping Corporation* v. *Norris Grain Co.*, 209 F. Supp. 249 (S. D. N. Y. 1962), the Court noted that in a tripartite arbitration it was not expected that an arbitrator appointed by a party should be completely neutral, but that the same situation did not apply to a third arbitrator appointed by the two arbitrators designated by the parties. The Court, quoting from *Astoria Medical Group* v. *Health Insurance Plan*, 11 N. Y. 2d 127, 134, 227 N. Y. Supp. 2d 401, 182 N. E. 2d 85, said:

> "Arising out of the repeated use of the tripartite arbitral board, there has grown a common acceptance of the fact that the party-designated arbitrators are not and cannot be "neutral", at least in the sense that the third arbitrator or judge is.

In *Cross Properties, Inc.* v. *Gimbel Brothers, Inc.*, 12 N. Y. 2d 806, Court of Appeals Judge (now Chief Judge) Fuld, in his dissenting opinion, said:

> "In view of the fact that an award made by arbitrators is well-nigh conclusive, the courts must be

> especially careful, when the impartiality or objectivity of an arbitrator, appointed as a neutral, is challenged, to make certain that there were no undisclosed disqualifying relationships between such arbitrator and a party which might have prevented him from rendering an unprejudiced or independent decision. This has been a long-drawn-out complicated and expensive proceeding, but I do not see how, if the integrity of the arbitral process is to be assured, we may uphold the determination made in this case."

In *Petition of Dover Steamship Company,* 143 F. Supp. 738, 741 (S. D. N. Y.), it was said:

> "Moreover, the designation by the parties themselves of arbitrators who may not be completely disinterested, accords with the generally accepted practice in arbitration proceedings of this type. In such case, it is quite frankly recognized that the 'neutral' arbitrator is one selected by the parties' arbitrators."

In *Milliken Woolens, Inc.* v. *Weber Knit Sportswear, Inc.,* 202 N. Y. S. 2d 431, 11 A. D. 2d 166, *aff'd* 9 N. Y. 2d 878, 175 N. E. 2d 826, cited by the Court of Appeals in the case at bar, the statute (Sec. 1462 of the New York Civil Practice Act) contained provisions identical to the Federal Arbitration Act, 9 U. S. C. Section 10(b), that an arbitration award may be vacated where there is evident partiality, or where the arbitrators are guilty of any misbehavior by which the rights of any party have been prejudiced. In that case, there was no attempt to prove evident or actual partiality.

The Court, setting aside an award where there was undisclosed prior relationship with the arbitrators, said:

"Since the waiver (of objections to partiality) is a matter of intention (Matter of City of Rochester, 208 N. Y. 188, 197, 101 N. E. 875, 877, 47 L. R. A., N. S., 151), the touchstone in these arbitration cases is the knowledge, actual or constructive, in the complaining party of the tainted relationship or interest of the arbitrator. Thus in Dukraft Manufacturing Co. v. Bear Mill Mfg. Co., 22 Misc. 2d 1057, 151 N. Y. S. 2d 318, McNally, J., set aside an award because no disclosure was made that business transactions between the arbitrator and one of the parties had increased considerably during the pendency of the arbitration proceeding. In Shirley Silk Co. v. American Silk Mills, 260 App. Div. 572, 23 N. Y. S. 2d 254, an award was vacated where the arbitrator designated by the respondent failed to reveal to appellant that, prior to the arbitration, the firm of which the arbitrator was president had received a substantial award (in another arbitration) from a board of arbitrators of which the president of respondent was a member. See also Knickerbocker Textile Corp. v. Sheila-Lynn, Inc., 172 Misc. 1015, 16 N. Y. S. 2d 435, affirmed 259 App. Div. 992, 20 N. Y. S. 2d 985."

The Court quoted from *In Matter of Friedman,* 215 App. Div. 130, at p. 136, 213 N. Y. Supp. 369, at p. 375 where it was said:

"During recent years arbitration has been more and more resorted to for the settlement of business controversies. It therefore becomes of the utmost importance that in statutory proceedings of this character, where the rights of parties are adjudicated, not by trained lawyers and judges, but by fellow-business-

men, every safeguard possible should be thrown about the proceeding to insure the utmost fairness and impartiality of those charged with the determination of the rights of the parties. Nothing should be permitted to throw suspicion even upon the entire impartiality of arbitrators. The finality of an award of arbitrators, as compared with the reviewable decision of a judge or a referee, makes this all the more important, and that the tribunal which is to pass upon the rights of the parties be not subject to the slightest suspicion as to its fairness."

In 5 American Jurisprudence 2d, on Arbitration and Award, p. 652, Section 181, on Partiality of Arbitrators, it is said:

"Partiality on the part of arbitrators is a well recognized ground for the setting aside of awards. It is not necessary, in order to warrant the intervention of equity, that the partiality be evidenced by an unjust award. It has been held sufficient that the relationship between the arbitrators and one of the parties is of such a nature as to give clear grounds for suspicion of their proceedings and render it unlikely that they constituted the fair and impartial tribunal to which the other party is entitled."

II.

Conflict of Court of Appeals decisions.

There is a conflict in the decisions of the Court of Appeals for the 1st Circuit in our case and of the Court of Appeals for the 2nd Circuit in *Ilios Shipping and Trading Corp.* v. *American Anthracite and Bituminous Coal Corp.*, 148 F. Supp. 698 aff'd 245 F. 2d 873, cited by the Court of Appeals in the instant case, with the decisions of the 3rd Circuit in *Rogers* v. *Schering Corp.*, 165 F. Supp. 295 (DCNJ 1959), aff'd 217 F. Supp. 266 (1959) and of the 9th Circuit in the *American Guaranty Co.* v. *Cauldwell*, 72 F. 2d 209 (1934), on the same matter.

The Court of Appeals in our case held that the prior business relationship was not sufficiently close to establish evident partiality although "it would have been far better if there had been disclosure." In *Ilios*, although the Court recognized the rule that an award may be vacated where there is evident partiality, it held that the mere fact that there is some business relationship between the arbitrator and one of the parties is not in and of itself sufficient to disqualify the arbitrator and it said "Something more than a vague and rather remote business relationship between the arbitrator and one of the parties to the arbitration is certainly needed if the losing party seeks to vacate the award on the ground of 'evident partiality' of any of the arbitrators." The Court of Appeals affirmed on the opinion of the District Court.

The third and ninth Circuit Courts of Appeals declared no such limitation on the rule as to disclosure of business relationship.

In *Rogers* the firm of one of the arbitrators had previously done business with one of the parties. Such arbitrator had disclosed this fact to the American Arbitration Association prior to his appointment in response to an inquiry concerning circumstances capable of suggesting bias or possible disqualification. However, this disclosure was not communicated by the Arbitration Association or the arbitrator involved to the other party.

The Court referred to the Federal Arbitration Act (9 U. S. C. §10) providing for vacating an award where "evident partiality" or corruption exists. The Court vacated the award, holding as follows (p. 301):

> "The failure of the Administrator (of the American Arbitration Association) to communicate to the parties information disclosed by a prospective arbitrator bearing upon circumstances likely to create a presumption of bias, and the consequent prevention of the party to proffer a timely objection based upon that information, is more than a loose procedural informality. It goes to the heart of a body designed to resolve controversy—its integrity. In this instance it fails to protect what might be termed 'due arbitration process'."

In *American Guaranty* it was held that a business relationship between an arbitrator and one of the parties is sufficient to set aside an award as "inherently partial, even though not corrupt or fraudulent" (p. 212).

The question which should be resolved by this Court is whether or not it is the duty of such an arbitrator and party to disclose *any* business relationship between them so that the adverse party may be informed with respect thereto *prior* to submission of disputes to such arbitrator.

It is to be noted that in the *Ilios* case one of the grounds for denying the motion to set aside the award was the knowledge by the adverse party of the prior relationship.

A party, such as the petitioner herein, should not be required to risk the failure of an inquiry to disclose business dealings between an arbitrator and an adverse party. The Court of Appeals in the instant case stated that in its opinion "there is a difficult line between what should, in good faith, be volunteered, and what may be left for inquiry." This Court should decide whether there is any exception or limitation to the rule as to full disclosure.

CONCLUSION

For the foregoing reasons the writ of certiorari, should be granted.

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